

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER No.1054 of 1998

Pratap Sarnaik and ors. .. Appellants

versus

Shri Waman Narayan Bhawe .. Respondent

...

Ms.Gauri Godse for the appellants.

Mr.S.S. Gokhale for the respondent.

CORAM : D.G. KARNIK, J

DATED : 14th December 2006

P.C.:

1. This appeal is directed against the judgement and order dated 15th October 19998 passed by the learned Civil Judge, Sr. Division dismissing the appellant's application for setting aside the ex-parte decree under Order 9 Rule 3 of the Code of Civil Procedure.

2. The respondent filed a suit bearing Special Civil Suit no.990 of 1994 against the appellants for specific performance of the agreement of sale of a motor car bearing registration no. MMF-7868. The respondents appeared in the suit but did not file the written statement. The respondents also were not present in the court when the suit was called out. The Court therefore decided to proceed ex-parte and after considering the evidence adduced by the respondent passed a decree for specific performance of the agreement, on 12th June 1997. The appellants thereafter filed an application bearing Misc. Application no. 413 of 1997 for setting aside the ex-parte decree and prayed for restoration of the suit and its trial on merits. The respondent opposed the application interalia on the ground that the application was not maintainable and also on merits contending that the appellants had not made out a good cause for their absence and for restoration of the suit.

3. After considering the evidence adduced, the trial court came to the conclusion that the application for restoration was not maintainable. The trial court held that the suit was decreed under Order 8 Rule 10 of the Code of Civil Procedure and in *Dhanvantrai R. Joshi*

Vs. Satish J. Dave reported in 1983(3) Mh.L.J 924 a Division Bench has held that a decree under Order 8 Rule 10 cannot be set aside in an application in Order 9 Rule 13 of the Code of Civil Procedure but the appropriate remedy to the aggrieved defendant was to file an appeal against such a decree. So far as merits of the case are concerned, the trial Judge held that the applicants had not made out a sufficient cause for their absence and therefore, there was no need to set aside the ex-parte decree. In view of this the trial court dismissed the application. This decision of the trial court is impugned in the present appeal.

4. Learned counsel for the appellant submitted that the decree in the suit was not passed under Order 8 Rule 10 of the Code of Civil Procedure. No doubt applicants had not filed written statement in the suit. However, the mere fact that the written statement was not filed was no ground for holding that the decree was passed under Order 8 Rule 10 of the Code of Civil Procedure. Order 8 Rule 10 enables the Court to pass a decree forthwith where the defendant fails to file the written statement within the time stipulated by the Court. Order 8 Rule 10 does not enjoin the Court to pass a decree in every case where the defendant fails to file a written

statement. Even when the defendant fails to file the written statement the Court, instead of passing a decree under Order 8 Rule 10, can pass any other order including an order requiring the plaintiff to prove his case on merits. In the present case, the Court did not pass an ex-parte decree on failure of the appellants to file the written statement but called upon the respondent to adduce the evidence. Accordingly, respondent adduced the evidence and on consideration of the evidence court passed a decree. Therefore, the decree was not one under Order 8 Rule 10 but was not under Order 9 Rule 6 of the Code of Civil Procedure. Application under Order 9 Rule 13 of the Code of Civil Procedure was therefore maintainable.

5. In Gaurang V. Merchant & ors. Vs. Madhliso & Co. Pvt.Ltd & Ors reported in 2004(2) All MR 737, I have held that where a decree is passed under Order 9 Rule 6 of the Code of Civil Procedure, inspite of the written statement not being filed by the defendants, an application for restoration is maintainable. Hence following the decision, I hold that the application for restoration was maintainable as the decree in the present case which was not one which was passed under Order 8 Rule 10 but was a decree under Order 9 Rule 6 of the Code

of Civil Procedure.

6. The trial court however has not dismissed the application for restoration merely on the ground of non maintainability. On merits, it has held that the appellants had not made out a sufficient cause for their absence and therefore dismissed the application on merits. The view taken by the trial court in this regard appears to be not only possible but probable. The ground pleaded by the appellants before the trial court for their absence was that negotiations for settlement were going on between the appellants and respondent and therefore, the appellants were bonafide under the impression that the compromise would be arrived at and it was not necessary for them to file their written statement and to attend the court.

7. It may be noted that applicant no.3 is a practising lawyer. He is practising as Government Pleader in the High Court, Mumbai. Certainly he was aware that negotiations for settlement would not exempt him and his brothers from the requirement of the filing of the written statement. He was certainly aware that if the written statement was not filed, the court may decree the suit under Order 8 Rule 10 or may proceed ex-parte.

In fact not only that he did not file written statement but also remained absent on all the dates to which the matter was adjourned from time to time. It may be noted that the matter was not decided ex-parte on the very first date but was adjourned from time to time and ultimately when the appellants were absent continuously for many dates that the court proceeded ex-parte. The appellant no.2 is an architect and appellant no.3 is a builder and developer and also claims to be a social worker. Thus, all of the appellants were men of law or business and were aware of the consequences of not filing of the written statement and further remaining absent on the dates fixed by the Court. The appellants have not adduced satisfactory evidence explaining their absence on multiple dates fixed by the trial court. In the circumstances, it cannot be held that they had a sufficient cause for remaining absent.

8. Learned counsel for the appellants strongly relied upon the decision of the Supreme Court in G.P. Srivastava Versus R.K. Raizada and ors reported in 2000(3) SCC 54 and contended that the expressions "was prevented by any sufficient cause from appearing" must be liberally construed to enable the Court to do complete justice between the parties. In paragraph no.7 of the

decision, the Supreme Court has observed "sufficient cause" for the purpose of Order 9 Rule 3 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The Courts have a wide discretion in deciding the sufficient cause to keep in view the peculiar facts and circumstances of each case. The facts and circumstances of the case I am satisfied that the appellants have not proved sufficient cause for their absence. The appellant no.1 is a lawyer and appellant nos.2 and 3 are men of business and were aware of the consequences of not filing the written statement and non appearance. That is required to be taken into consideration by the court while examining whether cause pleaded was sufficient. The trial court has rightly taken these facts into consideration and has come to the conclusion that there was no sufficient cause for their absence.

9. For these reasons, there is no merit in the appeal which is hereby dismissed.

(D.G. KARNIK, J)